ANNUAL REPORT OF THE MONTANA CONSUMER COUNSEL TO THE MONTANA LEGISLATIVE CONSUMER COMMITTEE FOR THE YEAR 1978

Creation of Office	1
Implementation of the Office	3
Acquisition of Capital Equipment and Office Space	9
Expenditures	9
Consumer Complaints	17
Decided and Pending Litigation	
Decided Cases	19
Cases Pending	22
Administrative Hearings	39
Congressional Cases	40
Federal Rule-Making Cases	42
State Rule-Making Cases	46
Federal Contested Cases	47
State Contested Cases	48
Anticipated Cases and Projects	50
Association Activities	55
Remedial Legislation	57
Other Legislation	60
Conclusion	61

GEOFFREY L. BRAZIER
MONTANA CONSUMER COUNSEL
34 W. SIXTH AVENUE
HELENA, MONTANA 59601
(406) 449-2771

ANNUAL REPORT OF
THE MONTANA CONSUMER COUNSEL
TO THE
MONTANA LEGISLATIVE CONSUMER COMMITTEE
FOR THE YEAR 1978

The Montana Consumer Counsel herewith and hereby submits his annual report for the year 1978 pursuant to the provisions of R.C.M. 1947, 70-707(7), now 69-1-222 MCA.

Much of what follows under this and some other headings has been set forth in annual reports to the Legislative Consumer Committee for previous years. It is herein repeated for handy reference of committee members and other interested persons and has been updated in light of 1978 experience.

CREATION OF OFFICE

The committee will recall that the office of the Montana Consumer Counsel is a creature of the Montana Constitution of 1972, which mandated the legislature to provide for such an office to represent consumer interests in hearings before the Montana Public Service Commission (PSC) or any other successor agency.

At the first legislative session following the adoption of the Montana Constitution of 1972, the legislature implemented the constitutional mandate by enacting what was codified as R.C.M. 1947, 70-701 and following. By that act, the legislature established the office as an agency of the legislative branch of government, answerable to a bipartisan committee of legislators serving as the Legislative Consumer Committee. The committee hires the Consumer Counsel and staff and

authorizes appropriate major expenditures, litigation, participation in proceedings conducted by federal regulatory agencies, and the hiring of expert witnesses and consultants for important cases.

The present Legislative Consumer Committee consists of Representative Joe Quilici, democrat from Butte, Chairman; Senator Allen Kolstad, republican from Chester, Vice Chairman; Senator Tom Towe, democrat from Billings; and Representative Earl Lory, republican from Missoula. Members usually are or have been businessmen, or have had business interests. Committee members are appointed each legislative session. They can succeed themselves if it is the pleasure of the appointing body.

The original Consumer Counsel Act was amended in 1974 to lend to the committee more flexibility regarding committee meeting dates and to give the office more discretion over what administrative matters the office might participate in. (The original statute mandated the Consumer Counsel to attend all proceedings conducted by the Public Service Commission. As amended, the authority is permissive and authorizes the Consumer Counsel to participate in regulatory proceedings before both state and federal regulatory agencies and courts.)

The Consumer Counsel Act was further amended in 1977 to make clear that the function of representing consumer interests in cases involving applications to increase rates shall be that of the Consumer Counsel when he petitions to become a

party in such cases. In some earlier cases there was confusion and duplication or contradiction of presentation between the staffs of Consumer Counsel and the PSC. In the opinion of the Consumer Counsel, this confusion has (for the past biennium) been effectively eliminated and rate case procedures are now more orderly. The legislature in 1977 also made it clear that the Consumer Counsel has broad discovery powers in cases contested at the agency level.

The Montana Consumer Counsel is the only such consumer agency enjoying constitutional status. It is also the only such agency functioning as an agency of the legislative branch of government. Other consumer counsels function under executive branches. The number of utility counsels across the country is increasing. Bills to create such an office at the federal level have been considered by Congress. Alternative forms of agencies have been discussed briefly in previous annual reports. Montana's approach is unique and considered the best conceptually by many observers of the consumer movement because of autonomy of the office. The office enjoys complete independence from the executive branch of government and the PSC. It also has enjoyed a unique aspect of open-ended funding, which is now under fire.

IMPLEMENTATION OF THE OFFICE

Under the Consumer Counsel Act, discretion reposes in the committee to staff the office and approve future expansion. The office is not now fully staffed. Staff presently consists of one full-time Consumer Counsel, who is a licensed attorney and one full-time salaried secretary-office manager. In addition

to the salaried staff, a utility advisor and a staff attorney are retained. The staff attorney was the first salaried staff attorney for the office. He is making an orderly transition to private practice. Staff is supplemented from time to time with the approval of the committee by the hiring of expert witnesses and occasional attorneys for major or complicated cases.

The Consumer Counsel is Geoffrey L. Brazier, of Helena, Montana, who took the position on August 1, 1973. Mr. Brazier has a background in constitutional, administrative and regulatory law and in government administration. Mr. Brazier has resigned. The effective date of his resignation is somewhat up in the air as of this report. It hasn't been decided whether his successor will be selected by the current committee or by the committee appointed during the 46th legislative session.

The staff attorney is John C. Doubek III, of Helena, a recent graduate of the University of Montana Law School.

A transportation advisor, Patrick F. Flaherty, formerly of Silver Spring, Maryland, had an extensive background in motor carrier cost accounting. Mr. Flaherty resigned recently to go into business as a transportation consultant.

Celia Farlan continues as the salaried secretary. The Consumer Counsel and the committee enjoy not only her professional secretarial and managerial skills, but the benefit of her experience from previous employment by the Public Service Commission.

The committee and counsel have been privileged to retain the services of William M. Johnson, of Helena, as utility cost and rate expert. Mr. Johnson was head of the utility and the centralized services divisions of the Montana Public Service Commission for many years, terminating his employment in the spring of 1974 upon advice of his physician.

Mr. Johnson remains the single most knowledgable person in the state of Montana with respect to the history, present activities, structure and records of all regulated companies, as well as of rulings and orders of the Commission and its predecessor.

The office continues to enjoy a mutually favorable relationship with the Marketing and Transportation Division of the State Department of Agriculture. These two offices have collaborated over the years in a number of major cases involving intrastate railroad rates and railroad line and facility abandonment applications.

With respect to the hiring of expert witnesses, the regular staff of the office has been able to handle its day-to-day business. However, the committee has seen fit to continue to hire the services of Mr. George F. Hess, Consulting Engineer, of Minneapolis, Minnesota, as an expert witness in recent cases involving rate increase applications by Montana's four major utilities. Mr. Hess has participated for over eleven years in matters involving Montana's largest utilities and is familiar with their books, records and properties so that he can efficiently analyze, prepare and give testimony in opposition to the utilities' cases based on generally accepted utility rate-making principles. It is anticipated that the Consumer Counsel will want to continue to rely upon Mr. Hess.

In addition to the services of Mr. Hess, and because of increasing caseload, complexity of issues, and legislative and congressional enactments, the committee has hired Dr. John W. Wilson, of J. W. Wilson & Associates, Washington, D.C., as an expert witness on behalf of consumers in major

cases involving rate increase applications by three of Montana's largest utilities and two major investor-owned water utilities. Dr. Wilson has testified in most cases as an expert with respect to the appropriate return on investment that should be allowed utilities under the circumstances of particular cases. He and members of his staff have also testified on electric and gas rate structures. It is anticipated that his firm could be retained in the future to present expert testimony on electric and gas utility rates.

The office has also relied upon the services of Mr. Richard Gabel, of Arlington, Virginia, as an expert witness and advisor with respect to separations, allocations and rate structure in the recent case involving an application by Mountain States Telephone and Telegraph Company for authority to increase rates. In that case, he presented testimony both with respect to telephone rates and in support of Mr. Hess's testimony regarding the phone company's revenue needs. Although Mr. Gabel speaks of retirement, it is hoped that his services will be available to the office for some time, because it is anticipated that Mountain Bell will be filing for additional rate increases in the near future. Mr. Gabel is almost universally recognized as the consummate expert in his field.

The committee has used Dr. Dennis Fitzpatrick, of Boise, Idaho, as a rate of return witness in two cases involving applications by Pacific Power and Light Company (PP&L) and its telephone affiliate for authority to increase rates in their service areas in northwestern Montana, Mr.

Robert E. O'Neil, of Salem, New Hampshire, as an expert with respect to the revenue needs, rate structure and quality of service of Northwestern Telephone Company (the PP&L telephone affiliate); and Dr. John W. Rettenmayer as a rate of return expert in a PP&L case that was later dismissed. It is probable that PP&L will renew its filing shortly and Dr. Rettenmayer's services will again be needed. Dr. Rettenmayer is on leave from the faculty of the University of Montana. He is headquartered in Alexandria, Virginia.

It is a possibility that other independent utility companies may file applications for authority to increase rates in future years. If this occurs, the Consumer Counsel may seek authority to hire either Dr. Rettenmayer, Dr. Fitzpatrick or Mr. O'Neil, depending upon the revenue at issue and the complexity of other issues in such cases.

Reasons for the hiring of Dr. Fitzpatrick and Dr. Rettenmayer on rate of return issues in the PP&L cases are that they are familiar with utilities in the pacific northwest. They will provide some variety in the personality of the office's witnesses, and they will add to a pool of expert witnesses in anticipation of the contingency that some witnesses customarily relied upon may have conflicts in schedules or interests.

The committee has also hired Mr. Richard Morgan, CPA, of the accounting firm of DeVries and Morgan, Helena, Montana, as an expert witness in a case brought by the City of Billings for authority to increase water rates, and as a consultant in other municipal cases. The Billings water case involves

an increased revenue request of well over $1 million and some serious issues with respect to appropriate utility rate-making practices. Mr. Morgan was likewise hired in the spirit of attempting to develop our pool of expert witnesses with diversity of personalities, and in a further attempt to develop local talent.

With respect to the hiring of counsel, the committee had earlier relied on the services of William E. O'Leary, of Helena, Montana, who was an attorney for the Public Service Commission for a period of approximately ten years. He mainly assisted in resisting major utility rate cases. His private practice has progressed to the point that time and clientel prohibit future use of his expertise.

The office has hired Mr. Thomas M. Auchincloss, Jr., of Washington, D.C., to assist it and the Department of Agriculture in litigating appeals from Interstate Commerce Commission decisions modifying rates for Montana intrastate transportation of commodities by rail and related matters. He is also presently assisting in an I.C.C. case in an effort to preserve the competitive viability of the Milwaukee Railroad. It is felt that the court cases involve issues of far reaching importance to shippers and carriers nationally. One case has the potential to go to the United States Supreme Court.

With the departure of Mr. Flaherty and Mr. O'Leary, with the gradual departure of Mr. Doubek, and with an ever-mounting case load including complex cases in state and federal jurisdictions, it appears a safe presumption that the skeletal staff will have to be supplemented soon.

However, uncertainties regarding funds and functions remain to be resolved in the legislature and the courts. It would not appear, therefore, that this is the best or fairest time for either the committee or job applicants to try to enter into enduring relationships. The office hopes to keep on top of the current case load until the legislature adjourns in 1979. At that point, there should be a clearer view of what the future holds.

ACQUISITION OF CAPITAL EQUIPMENT AND OFFICE SPACE

With the hiring of a salaried staff attorney in 1976, it became necessary to obtain additional office space and equipment. The office moved to remodeled accommodations at 34 West Sixth Avenue, in Helena. The office plans no moves in the immediate future. The only possible apparent move might be to accommodations in the state capitol complex if provided by the Department of Administration. There has been no dialogue on this subject. Although it was a recent possibility in the light of the construction of a number of government buildings, no discussion has been had since the completion of construction.

There appears to be no future need for any additional major office equipment.

EXPENDITURES

Functions of the office are financed by assessments against the gross intrastate operating revenues of all companies regulated by the Public Service Commission and in accordance with constitutional and statutory provisions. The legislature appropriated $80,000 per year for the functions

of the office for the first two years of its existence. Appropriations for the fiscal year ending June 30, 1976 were $125,753, and for the fiscal year ending June 30, 1977 were $128,397. Appropriations for the fiscal year ending June 30, 1978 were $150,762 and for the fiscal year ending June 30, 1979 were $155,717. For the fiscal year ending June 30, 1978, it became necessary for the committee in accordance with statutory authority, and following the advise of the Governor's Office of Budget and Program Planning, to amend the appropriation upward to meet unanticipated expenditures for the purchase of meters for an electric load study of Montana Power Company and payment of fees of expert witnesses and counsel. The problem was aggravated by low utility earnings due to a mild winter. It is clear that the committee will also be obliged to amend the appropriation for the year ending June 30, 1979 or find other sources of funds in order to meet developing but unanticipated expenses.

The committee has in the past amended its appropriation without controversy. This was because the levy rate was not increased during any fiscal year. There was no controversy the two times the levy rate declined, either.

In past annual reports, we speculated that increased case loads could lead to increased necessary expenses, which would in turn lead to the first levy rate increase in history. We correctly anticipated that this could lead to controversy and challenge to the flexible funding of the office from regulated companies.

Not only does it seem likely that bills will be introduced

in the 46th legislature to amend Consumer Counsel financing statutes, and that a line appropriation will be given serious consideration, but Montana's four largest utilities have filed court challenges of the Consumer Counsel's budget amendment procedures and variable tax levies. These challenges are being vigorously defended because budget amendment procedures were in accordance with the advice of the Governor's Office of Budget and Program Planning and involved participation and overview from the Department of Revenue, Legislative Auditor and Legislative Fiscal Analyst. The background or circumstances in which the statute was enacted also suggest vigorous defense. At the time the statute was enacted into law, the legislature had in mind past occasions when the PSC was short of funds and therefore without resources to adequately scrutinize utility rate cases. The legislature did not want that to happen to the Consumer Counsel.

We have difficulty finding consistency in the posture of the utilities that challenge the variable funding feature of the Consumer Counsel Act. Whereas they contend that it isn't fair or proper for the Consumer Counsel to be able to vary its finances to afford necessary consultants in major contested cases, they themselves enjoy just such a luxury in their rate case preparations and presentations, and in addition, can orchestrate the timing of their applications at their convenience and with other utilities to innundate the Commission and this office. It can't be too strongly emphasized that utility rate case expense is legally assignable to customers, just as the Consumer Counsel tax is. Without

exception, the utilities expend far more than the Consumer Counsel does. In one recent case the utility claimed a rate case expense higher than the Consumer Counsel has spent for its operations for every entire year of its existence, except one.

In any event, the levy rate against regulated companies presently is computed by the Department of Revenue based upon appropriations to the office of Consumer Counsel (as may be amended on resolution of the Legislative Consumer Committee under the provisions of HB 145 of the 45th legislative assembly) and total gross operating revenues of regulated companies as reported by the PSC to the Department of Revenue. During 1976 the levy rate declined, reflecting increased revenues of regulated companies. In 1977 the experience was reversed. Revenues of regulated companies were low during the winter of 1976-77 because of the relatively mild climate and an effort by the Department of Revenue to purge from its records all regulated companies who had been inadvertently levied against on the basis of gross operating revenues for interstate service. Climatic conditions for the winter of 1977-78 were more harsh and the utilities made more money. The winter of 1978-79 has started early. Another case load heavier than anticipated during the original appropriation process looms.

Although it was foreseen that the past year (FY 78) would involve the greatest volume of revenue increase applications, the greatest number of applications by major regulated companies, and the most complex issues in the history of

regulation in the state, there was no way of quantifying in advance the financial burdens upon this office for providing expert witnesses. The situation was aggravated by reluctance on the part of some major utilities to give meaningful responses to discovery such as data requests. The situation was also aggravated by the fact that a number of major gas utilities have requested authority to increase rates because of the alleged existence of emergency conditions. The same circumstances exist during this current fiscal year.

In both years a number of PSC decisions were appealed to the courts as will hereafter be described in more detail. Some cases were brought by the Consumer Counsel. Most were brought by regulated companies. In many of these cases, the Consumer Counsel appeared in defense of the Commission. Some cases required -- and some may require -- the services of expert witnesses to provide the courts with information on issues that allegedly were not fully developed in hearings before the Public Service Commission. All of these conditions have combined to increase the necessity for expert witnesses, and in a few instances, outside counsel. Witnesses were paid not only for time testifying, but time preparing to testify and for assistance in preparing pleadings and briefs, as well as expenses.

In retrospect, it is clear that the correct level of expenses was not anticipated when the appropriation request was submitted. Although the office has been able to control its fixed expenses, it has not been able to limit its variable expenses.

This year we are again in the exercise of trying to anticipate case load and related expenditures for the ensuing biennium, but as yet do not know of a reliable method of accurately forecasting what companies will file, when, or what issues will be presented.

A number of factors add to the current confusion. Grant money should be available under the Public Utilities Regulatory Policies Act of 1978 (PURPA) for examination of and submission of testimony regarding the rate structures of Montana's three electric utilities. It is anticipated that environmental laws will require many Montana municipalities to build water and sewer treatment plants. These will have to be financed in part by increased water and sewer rates. Under the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Montana's railroads have noticed intent to abandon piecemeal substantial mileage of track. This is an ongoing process which this office has been involved in a number of such cases. A domino effect triggers railroad station, stockyard and trackage abandonments under Montana law. Also in the field of transportation, the difficulties of the Milwaukee Railroad offer a predictable focus of future cases. Although we don't anticipate a heavy load of motor carrier rate cases, forces are at work here which could change things. There is a strong effort toward deregulation of motor carriers in interstate commerce. (Experience teaches that this does not eliminate cases and issues. It usually substitutes new ones for past ones.) The I.C.C. is considering a number of rules which will substantially

effect its motor carrier regulation. The ripple effect will reach Montana regulation. There is talk of the legislature transferring motor carrier regulation from the Public Service Commission to another department of the executive branch of government. Instability in the telephone industry because of rivalry for markets for terminal equipment could add to the case load.

It once was the experience of this office that the incidence of case loads tended to subside during legislative years. However, as of this report, that pattern does not appear to be in evidence for the fiscal year ending June 30, 1979, or future years. The committee is presently considering both the budget amendment process it has used in the past and (to be on the safe side) submitting a bill to amend the appropriation for FY 79. Uncertainties make it impossible to forecast actual necessary funds for the balance of the fiscal year as of this report.

The Legislative Consumer Committee has been regularly favored with copies of computer printouts supplied by the Department of Administration showing the current financial posture of the office with updated comparisons of anticipated and actual expenditures for the operation of the office. As supplementary material, the Consumer Counsel herewith submits the following summary of expenditures for the office for the months of January through December, 1978, inclusive, and a comparison with calendar year 1977 results.

	1977	1978
Salaries	$75,890	$71,502
Other Compensation	787	1,117
Benefits	8,742	8,934
Contracted Services	180,899	182,843
Supplies	636	657
Communications	5,928	4,461
Travel	6,461	7,807
Rent	3,900	2,444
Other Expenses	2,115	1,916
Equipment	45,137	2,374
TOTAL	$330,495	$284,055

Normal monthly expenditures, exclusive of contracted services for expert witnesses and outside counsel, have been about $8,000.00. Unusual expenditures have been the rule rather than the exception during the past two years. In order to accommodate these exceptions, it has been necessary to borrow from the general fund. Those loans had to be repaid before the end of the fiscal year in which the funds were borrowed. A budget amendment bill could avoid such problem this fiscal year.

In response to a directive from the Governor's Budget Director and with the approval of the committee, budgets of $310,270 and $320,090, respectively, for the two years of the next biennium (1980 and 1981 fiscal years) have been proposed. This took place before litigation over the Consumer Counsel tax and budget amendment process took form. As one result of that litigation, the committee is considering a

line appropriation of more funds to cover bigger case loads in the event the courts or the legislature do away with the variable feature of financing office functions. In considering this option the committee made it clear that it did not consider past budget amendment procedures to be improper in any manner.

The Consumer Counsel personally is negative toward a line appropriation for a number of reasons: Higher appropriations may tend to encourage squandering of funds. If expenditures do not meet appropriations, future legislatures may trim future appropriations to previous actual spending levels. A year of unusually heavy filings will catch the Consumer Counsel (and the public) short of funds and unable to offer viable defenses. The controversy will start all over again. Ninety percent of committee time now is dedicated to evaluating expenses.

The committee recently tabled a proposed bill to appropriate to the Consumer Counsel out of its earmarked revenue fund, monies to participate in federal cases in an effort to protect the competitive viability of the Milwaukee Railroad. It was thought that such monies ought to be provided by the general fund.

CONSUMER COMPLAINTS

The title of the office is "Consumer Counsel". It is taken from language in the Constitution. We are listed separately in telephone directories. These circumstances have lead to the assumption on the part of many people that the functions of this office include handling problems of

the typical retail consumer nature. Quite predictably, the office has had numerous occasions to correct mistaken assumptions and to refer complaining parties to the Consumer Affairs Division of the Department of Business Regulation or to other appropriate consumer protection agencies. At one time the office kept count of the actual number of referrals. However, experience indicated that a great deal of otherwise more useful time was spent in documenting referrals, so the practice was abandoned. It seems safe to say that referrals during the past four years averaged more than one a day.

The PSC has created a staff position of Customer Service Representative. Referrals on relevant matters are made to her office on a regular basis. Most complaints have been disposed of without further formal difficulty.

Under the provisions of R.C.M. 1947, 70-119, as amended by Chapter 138 of the Laws of 1975, (now 69-3-321 MCA), this office has delegated authority to represent parties whose utility service has been denied or terminated. We stand ready to serve in the capacity authorized, but are alert not to usurp fee-generating cases. We have had a few occasions to go to contested case proceedings before the PSC.

Other subjects of complaint have included shipper claims. Because this office has no delegated authority to enforce the law or a PSC regulation, complaints have usually been referred to the Motor Carrier Enforcement Bureau of the Commission or to the Bureau of Motor Carriers of the Interstate Commerce Commission.

DECIDED AND PENDING LITIGATION

At this point in time, the Consumer Counsel is involved as a party of record in cases pending before federal courts and before the supreme court and district courts (that is, trial courts) in the State of Montana. Because many of these cases involve interpretations or applications of statutes, they have potential far-reaching impacts.

Decided Cases

In the past year there were two important cases in which this office was involved that were the subjects of final court orders. One was a district court case in Montana involving one of the major utilities. The other was a supreme court case deciding that the PSC has regulatory jurisdiction over sewer rates.

In the sewer case the Town of Eureka sought to impose discriminatory rates upon a user who, in fact, was one of the major property owners in the town. That user appealed unsuccessfully to the district court and appealed from there to the supreme court. He asserted not only the facts of discrimination, but that jurisdiction over rates should have been in the PSC in the first instance. The Town of Eureka was joined by the PSC as a defendant against that assertion. When the matter came to the attention of this office, we participated in support of the contention for jurisdiction. (The committee will recall that the issue had come up earlier before the PSC, that it had decided both ways, that the district court in Helena had decided that the Commission has jurisdiction under very limited circumstances, and that it was decided at that point that the

Eureka case would be a better vehicle for laying the issue before the supreme court.) The supreme court entertained both briefs and oral argument from all parties including this office. Thereafter it interpreted the Public Utility Act to include sewer service as a regulated utility and that is where the law now stands.

It seems a safe prediction that bills addressing the jurisdictional question will be introduced at the next session of the legislature. It remains to be seen what form they take. Suffice it to say that it has been established as a fact that sewer service can be regulated.

At this point, pending a final resolution of the question by the legislature, the Commission has ordered all municipalities to file their current tariffs with it and to make application for any contemplated rate increases. If the final result of legislative discretion is that the Commission retains jurisdiction, it is our information that the Commission intends to adopt a system of accounts, an annual reporting form, and minimum filing standards for rate cases. This, combined with congressional environmental mandates, will likely lead to a request on the part of the Commission for added staff. We feel that it could possibly lead to or contribute to, a request for another staff position for this office.

Although the substantive issues of the district court case involved the propriety of Commission substantive decisions on four issues in a rate case, in our opinion the most important aspect of the district court's judgment related to a procedural consideration.

Of importance regarding the substantive issues was the decision of the district court that the discretion exercised by the Commission was well within its delegated authority and supported by the record. It is judicial recognition of certain rate case treatment that this office has advocated since its inception.

The procedural issue of note involved the utility's choice of remedies. Presently there is the remedy of appeal under the Administrative Procedure Act, which expressly states that that remedy is not exclusive. There is also a remedy of appeal under the Public Utility Act. This was the historical and traditional procedural route prior to the Administrative Procedure Act. Confusion is caused by different language in the two statutory enactments whether, and under what circumstances, the district court can receive new evidence, and what is the standard for establishing a reversible error by the agency under review. The district court resolved these questions by holding that it could receive evidence on review under the Public Utility Act, although that evidence could have been presented to the agency in the first instance. It also held that, whereas the sum total of evidence before the agency must leave the reviewing court under the Administrative Procedure Act with an overriding feeling that the result is wrong (the clearly erroneous doctrine) before it will reverse the agency, a basic showing that there is substantial evidence of record at the agency level will sustain the agency decision against challenge under the Public Utility Act.

The court orally expressed from the bench its discomfort with the different standards upon review presented by the two statutes, and suggested that the subject would be worthy of legislative scrutiny. However, this committee when presented with consideration of this subject for remedial legislation, declined to sponsor a bill speaking thereto on the theory that the Consumer Counsel's effectiveness might better be preserved if it also enjoyed a choice of remedies in the rate-making scheme.

Cases Pending

Apparently the courts do not progress their cases as expeditiously as the Commission is obliged to under the recent statute mandating final decisions within nine months. Many cases that were reported in our 1977 annual report are still pending. Several new cases with the potential of establishing precedent are now pending.

As reported last year, this office is involved in two cases in federal circuit courts of appeals against Montana railroads and for the I.C.C. in one case and against the I.C.C. in another case. In both cases, because of the esoteric subject matter and the far-reaching precedents that could be set, the committee saw fit to associate Washington, D.C. counsel specializing in transportation regulation. Whereas last year we reported that the cases had been filed, we can now report that both written briefs and oral argument have been submitted, and that the cases are under advisement

pending decision. Easily, the most significant case is the one submitted to the circuit court in San Francisco, wherein the Department of Agriculture joined in advancing an appeal from an I.C.C. decision granting Montana railroads authority to raise their rates on intrastate traffic to levels established for interstate traffic under the infamous Section 13 of the Interstate Commerce Act. Our appeal was based upon the procedural ground that railroads had submitted essentially nothing by way of evidence to either the Montana Commission or the I.C.C., whereas the Montana defending parties had submitted the overwhelming weight of evidence. Thus the I.C.C. had abused its discretion in ignoring the only probative evidence of record. Substantive legal grounds of our appeal were based on the proposition that by handling the case in the manner in which it did and by rejecting defendant's evidence, the I.C.C. had gone the final step in applying the Interstate Commerce Act in a manner not intended by Congress. If it were intended that there be no defense to a Section 13 case, then why didn't Congress say so, and why is there a hearing process?

This case was recognized as a precipitiously uphill battle from the beginning. Although we were sustained by the righteousness of our cause, we were realistic to recognize the immensity of the challenge. After oral argument in San Francisco, both Washington, D.C. counsel and the Consumer Counsel are more optimistic than ever about the prospects for a favorable decision. However, because our arguments strike at the very heart of the scheme for fixing intrastate

rates, we view it as a distinct possibility that Montana railroads, if they lose, will appeal to the U. S. Supreme Court and be joined by many interstate railroads and possibly some state commissions, as well as the I.C.C. The three possible results of such eventuality are that we could win, the railroads could win, or Congress could change the Interstate Commerce Act. At any rate there is a definite prospect of the need for further expenses for litigation in this case. Dollar-wise it reflects approximately $300,000 per month in rates paid by Montana shippers. This has cumulated to millions of dollars since the onset of litigation.

(For the sake of clarification to the casual reader, the difficulty with the rate-fixing scheme is that, under the Federal Administrative Procedure Act as interpreted by the federal courts, it is a proper exercise of rule-making discretion for the I.C.C. to fix interstate rates based upon a composit national filing by all interstate railroads. Obviously, since it is the northeast railroads that are in economic jeopardy, their operating results tend to distort the composite picture to show a revenue need for all interstate railroads. We view this as a windfall to western railroads which serve Montana. Under Section 13 of the Interstate Commerce Act, once interstate rates are set at a specified level, the railroads apply to the state agencies for authority to increase intrastate rates to the interstate level. If the state agency does not grant relief within a specified period of time, then the I.C.C. has authority to review the matter and make rate adjustments accordingly. This historically

has been a state's rights issue. Unfortuntately, a couple of decades ago the railroads persuaded Congress to include a parenthetical proviso in Section 13 to the effect that it was not necessary for railroads seeking relief under Section 13 to present a separation of intrastate operating revenues and expenses. It is our contention, however, that they must have to prove something. Not only that, but under the legalized discrimination under the "value of service" approach to transportation rates, the railroads can institute so-called "holddowns" and "flagouts" for select commodities. To add to the aggravation of all of this, Montana defendants went ahead and assumed the burden of disproving the railroad's allegations. Traditionally, the burden of proof is on the party who seeks relief. Shippers and consumers should not have to shoulder this burden. The effect of the ruling of the I.C.C. was that, regardless whether shippers and consumers go that extra mile and assume the burden of proof, they still can't prove a defense.)

(The reason for the speculation about the posture of some state public service commissions is that the National Association of Regulatory Utility Commissioners' Committee on Railroads has been examining the question of separation of intrastate and interstate data and has reported that it is experiencing resistance from some state agencies because of fear that such an exercise will raise rates in those states that are now being subsidized by revenues from interstate commerce. For our part, we feel that this would be a valid subject for I.C.C. rule-making or Congressional action.)

The other federal court case arose from the same I.C.C. docket that the San Francisco case does, but that case is on an ancillary issue. When the I.C.C. was considering the case on its merits, the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act) became law. The 4-R Act amended procedural constraints for I.C.C. case handling. Montana railroads in retrospect assert that they were relying upon provisions of the 4-R Act when they implemented increased rates prior to final decision by the I.C.C. Montana parties challenged the premature implementation of increased rates and the I.C.C. ruled against the railroads. It is estimated that approximately $300,000 was at issue. The railroads appealed on this unique procedural issue which does not appear to have far-reaching regulatory precedent. On December 20 the federal court in Chicago reversed the I.C.C. (We lost.)

The importance of this case was that, throughout our Section 13 experience with the I.C.C., we have been advised by that agency, by our Washington, D.C. counsel and by Montana railroads, that the proper procedural remedy for rate relief on Montana intrastate traffic is to file a complaint with the I.C.C. challenging those rates when once set by the I.C.C. We are in receipt of estimates from consultants and I.C.C. practitioners that the costs of expert testimony for such an effort would exceed $100,000. Obviously, this poses budgetary complications for the office. The $300,000 at issue, which we don't plan to be appealed to the U.S. Supreme Court, had the potential of providing funds for a complaint action.

(On the other hand, as reported elsewhere herein, the

I.C.C. has recently handed down an order in an unrelated Section 13 case initiating an investigation into Montana grain rates. This is an historical first in I.C.C. railroad regulation, and we take pride in it. However, it could be a disguised attempt to head Montana parties "off at the pass" with respect to a complaint action. It requires the same type of presentation as a complaint action, but under much more limited circumstances as to time and resources.)

There are two cases pending in the Montana Supreme Court. One deals with substantive issues of a far-reaching nature. The other deals with an unrelated procedural issue which otherwise has far-reaching implications.

By the time this report is published, the Court will have received briefs and entertained oral argument in the case involving substantive issues. In that case, the Montana Power Company appealed provisions of a Commission order relating to an adjustment to its electric utility rate base to reflect the actual cost of constructing some of the small dams around the state and acquiring related land when that property was first dedicated to public service, instead of assigning as a value the negotiated price when the property was transferred in the consolidation of companies having common ownership into what is now the Montana Power Company. The PSC order also relates to an investigation of aspects of the utility's electric utility rate base, and to certain rate-making criteria adopted by the Commission.

This office joined the Commission in defense of its order. The district court ruled in support of the Commission on two of the three issues and in support of the utility on

the remaining issue. Unfortunately, in making its order, it drew from language in presentations of opposing sides with the result that the district court's order contains some contradictions. We unsuccessfully sought an order clarifying the issues and then appealed. The utility cross-appealed on the issues which it lost in the district court. All three issues are now before the Supreme Court.

Of concern to this office was a finding of fact by the district court that an earlier assignment by the PSC of certain accounting entries to certain accounts while in the process of establishing a system of accounts was etched in stone and the values could not be disturbed in later rate-making cases regardless of changes in statutes or economic circumstances, plus a finding that implied that the Commission does not have authority to conduct audits or examinations of utilities as part of its regulatory functions. Of concern also are the company's assertions that the adoption of an average year rate base is illegal under Montana statutes.

Obviously, a regulatory agency should be free to examine a regulated company's property, revenue and expenses in the light of current circumstances in order to render meaningful decisions in the regulatory process. Obviously, if it is to have any capacity to regulate, it should be free to conduct audits of regulated companies, especially when the regulated company can be reimbursed for the cost of the audit through an allowance for operating expense in a rate case. It also seems obvious to those of us who practice in a somewhat esoteric field that the regulatory agency does have some

discretion which type of test year to adopt so long as property, revenues and expenses are properly matched. It has been our contention which has been adopted by the Commission that actual historic test year data is more accurate than forecast data. Also that an average year rate base more closely matches earnings for the year than would a year end rate base which should generate higher earnings at an amount that does not lend itself to being reliably predicted.

The other case before the Supreme Court is on appeal by the City of Billings from a decision by the district court in Helena not to change venue to Billings. Although the Montana Power Company case probably could have avoided Supreme Court attention if the district court had entertained our motion to clarify, the Billings Water case is, in our view, one that should not be before the Court in the first instance. We have told counsel for the City on several occasions we would be happy to stipulate that the cases can be heard in Billings if the parties can agree upon a judge who is capable of understanding the technical issues presented. The City's response is to appeal. The district court in Helena denied the City's motion for change of venue in reliance upon the express language of a recent Montana Supreme Court decision with respect to venue of an appeal from an agency action under the Administrative Procedure Act. It is recognized that the subject of venue has fostered as much litigation as any other procedural issue, and is constantly subject to change. In view of the historical

treatment of the subject matter, we feel that the case has precedent-setting potential for many practitioners in Montana, but is of little potential value with respect to substantive regulatory law. Nevertheless we are caught up in this process and are defending vigorously.

Of course, there are the four court cases lodged in the district court in Helena regarding the propriety of the Consumer Counsel tax, the budget amendment procedure, and the variable or "open-ended" flexibility of providing funds for the office when the occasion demands. All of Montana's four major utilities have filed separately, but have filed similar pleadings. It appears that the Montana Power Company is the lead party. We are advised that certain regulated motor carriers are contemplating petitioning to intervene in one or all of the cases, and presume that it will be in the lead case with the Montana Power Company. In that case, the parties indulged in a process of moving to substitute judges and have finally settled on Judge James B. Wheelis of Missoula, recently appointed to succeed retiring Judge Dussault. The legal division for the Department of Revenue and the Consumer Counsel are handling the defense for all named parties, including the Governor's Office of Budget and Program Planning. As of this report, the cases are pending disposition of motions to dismiss submitted on behalf of agency defendants. In layman's terms, the theory of defense as a matter of law at this stage is that, assuming the allegations of the taxpayers complaint to be true (they are not) the complaint still fails to state a cause of action,

because the taxpayer misconceived his remedy and it is too late to pursue the proper remedy.

Another frustrating aspect of this litigation, which we view as primarily harassment and an attempt to heap an added burden upon the limited resources of this office is that, in what we view as the unlikely event of a successful result on behalf of the utilities, the probability is that their claims or judgments will be repaid out of the earmarked Consumer Counsel revenue fund. In the final analysis the source of this fund is taxes against the same taxpayers who are challenging the propriety of the budget amendment process. They will be repaying themselves.

This litigation is the subject of close scrutiny by most state agencies because the budget amendment process is the same one indulged in by those state agencies during the past biennium. If it was improper, many agencies may be subject to claims.

As reported elsewhere, the committee, while not admitting to any impropriety in the budget amendment process, is studying legislative means for resolving the issues posed by the complaints of the taxpayers.

In addition to the Consumer Counsel tax cases and the Supreme Court cases, there are two other cases pending in the district courts in Montana involving Commission orders with respect to Montana Power Company electric utility service.

In one case in the district court in Butte, Judge Blair presiding, the Commission, based upon the testimony of our witness, Mr. Hess, excluded several million dollars from the

utility's electric rate base as an acquisition adjustment for the original cost of Milwaukee Railroad transmission lines. Although we did not contend that the management made an imprudent decision when it decided to buy the railroad's transmission line (which otherwise probably would have been abandoned) at the price it did, that price was in excess of the original cost to the railroad when the facility was first dedicated to public service. Under both the then F.P.C. system of accounts and the then and current NARUC system of accounts, there should have been an acquisition adjustment and a reduction in rate base. Mr. Hess'es testimony was based upon the FPC's treatment of the transaction. The utility has appealed from both the FPC decision and the Montana PSC decision. It is assumed that the state district court will withhold judgment until the judgment of the federal circuit court of appeals in San Francisco is made known. In view of that court's reputation for lag in rendering decisions, a final resolution of this issue may be some years distant.

In the other district court case, two major industrial customers appealed from that part of the Commission's order establishing electric service rate structure and therefore revenue burden upon the various customer classes. We view this case as an extension of earlier litigation involving the previous final decision of the Commission in the previous electric utility rate increase application by Montana Power Company. In the earlier case, the district court reversed the PSC because its decision as to rate structure was not in

the opinion of the court, based upon evidence of record. In the present case, we have intervened in defense of the Commission. It is our analysis that the issue before the court is whether there is now sufficient evidence of record before the agency to support its currently-assailed rate case decision ("substantial evidence"). A decision by the court probably will not be made until the middle of 1979. In the meantime, the utility and the Anaconda Company have disputed whether revenues at issue should be impounded or the repugnant parts of the PSC order stayed. The case has the remote potential for creating an issue whether one customer class is responsible for paying a rebate in case the Commission is reversed in part of its order allocating burdens among customer classes.

We have heretofore commented upon litigation involving the City of Billings and its water rates. There were in fact two appeals from the Commission's decision, one brought by us and one brought by the City. The issues which we are pursuing involve the propriety of permitting a city automatic authority to increase rates in the event that it incurs another indebtedness through a bond issue in a future year, when the record shows that such bond issue has not even been considered by the City Commission, and whether the PSC erred in granting the municipality not only its debt service, including principle, interest, reserve and coverage, but an allowance for maintenance and an allowance for recurring future annual capital improvements. We decided to look the other way with respect to recurring capital annual improvements

although it is questionable whether they are proper under the "used and useful" provisions of Montana statutes. In this case they appear to be emminently necessary. They were the subject of City Commission resolutions, and they are supported by detailed plans, specifications and accounting constraints. On the other hand, under most Montana indentures, cities are limited in what they can do with surplus funds collected for the purpose of meeting the so-called "coverage" requirements of a bond indenture. As with most indentures, those outstanding for the City of Billings, restrict the use of such funds to water facility replacement and maintenance. In other words, the City in this case not only had an allowance for maintenance, an allowance for replacement, but an additional allowance for repair and replacement through the indenture's coverage requirement. We view this as causing the customers of the utility to pay twice for the same expense to the extent of the coverage requirements of the indenture. Moreover, this is a rate case treatment that, to our knowledge, the Commission has never before indulged. We view it as a dangerous precedent permitting windfall revenues for all Montana municipalities.

One of the procedural difficulties is attempting to require the Commission to admit that its action on this issue is unprecedented. There is no express provision under the Montana Administrative Procedure Act for discovery on review to the district court, and there is a recent Supreme Court case that says that the Commission is not subject to discovery on appeal under the Public Utility Act.

Aside from its contentions with respect to venue and its general dissatisfaction with not being able to understand the windfalls it was granted by the PSC, the main complaint of the City of Billings apparently is that the PSC would not allow it sufficient funds to pay off past indebtedness. This, of course, is a utility rate-making rule of long standing recognized by the highest courts in the land. It is also an issue which we are litigating in the Helena Water cases. It is of the nature of prohibiting retrospective rate-making. It cuts both ways. If utilities are allowed revenues to make up past indebtedness, then they should be subject to reduced revenues when they have in the past enjoyed earnings higher than their allowed rate of return. In the final analysis, we go back to the basic issue of regulation. Is a utility to be guaranteed an income or granted an opportunity to earn up to a certain level? Justice Brandice resolved that question in favor of the allowed opportunity to earn so that regulation becomes the law's substitute for the pressures of competition in fostering productivity and efficiency in utility management.

This same issue of allowing a utility funds to make up past indebtedness was raised by the City of Helena in its appeal from the PSC's recent order. Our unsuccessful motion to dismiss under the Administrative Procedure Act did catch the attention of the judge. It remains to be seen which case is resolved first, Billings or Helena. In the unlikely event that this issue is lost in the face of the overwhelming weight of precedent, we will be seeking authority to litigate

to a higher court or suggesting remedial legislation.

The other primary issue in the appeal that this office brought from the Commission's final order in the Helena water rate case is that none of the balance of the Commission's decision that is assailed by us is based upon the record of hearing. Heavy reliance is placed upon the earlier decision of the local district court in the case reversing Montana Power Company's electric utility rate structure.

(The Helena Water order and other orders now being litigated were handed down by the Commission at a time of great transition among its staff when the Commission was short of the services of either attorneys or persons familiar with the subject matter or graced with a sense of continuity of regulation. Under the circumstances at that time, litigation seemed to be the most reliable procedure for laying those issues to rest and correcting deviations by the Commission.)

There is an additional court case arising from the Helena water rate proceeding which is still pending. (We have heretofore commented upon the results of litigation arising when the City of Helena, having failed to persuade the PSC to grant rates to the requested level, arbitrarily adjusted its sewer rates.) Although the case might be viewed by some as stale as of this late date, it is being held in suspense pending action by the PSC or the legislature on procedures for handling temporary rate increase cases. Underlying this litigation was the fact that the PSC granted the City of Helena a temporary rate increase without ever notifying the Consumer Counsel or the public that an application

for a rate increase had been filed. We were successful in persuading the district court to stay the temporary rate increase order, but after hearing, for some reason which we are still at a loss to explain, the district court lifted its stay and allowed the rates to go into effect retrospectively. Needless to say, disqualification of that particular judge is now a perfunctory act.

There is also pending before the district court in Helena an appeal from a PSC decision authorizing Northwestern Telephone Systems, Inc. to increase its rates to a level higher than conceeded by this office. Our appeal is upon three issues, including an assignment to rate base of approximately $1 million worth of operating plant which will not be functional for some years after the close of the test year, an assignment to rate base of a relatively small amount of property based upon what we feel is an erroneous computation by the Commission, and an adoption of a rate structure which cross-examination exposed to be among the most arbitrary and discriminatory we have ever run across. This was another decision handed down during the time of intense staff churning at the PSC. Among the rationales for deciding as it did, the Commission found that the Consumer Counsel did not come forward with certain material upon which it could base alternatives. We view this as a fundamental error in assigning the burden of proof in utility rate cases to protestants. Not only is this reasoning being challenged in court, but we advocate that the committee introduce and carry a bill amending the Public Utility Act to make clear who the burden of proof is upon in rate cases.

When the PSC shifted the burden of proof to protestants it even burdened them with submitting tariffs. This was in a case involving numerous tariffs where the revenue earnings level for the utility had not been established by the PSC. Obviously a large utility with computer capability is going to experience difficulty shouldering this burden. One consultant working out of his home in New England is faced with an impossible burden under these circumstances.

There are pending two cases which were mentioned in our 1977 annual report. One deals with an appeal by the Milwaukee Railroad from a Commission decision not to allow it to abandon its station at Drummond. The other deals with a petition by Mountain Bell for a declaratory judgment whether certain of its statistical data regarding competitive services and products is trade secret and therefore should be protected from public scrutiny in rate cases.

It is probably stating the obvious to report that, with the filing of a petition in bankruptcy by Milwaukee Railroad there has been no progress in the litigation. There probably won't be until after some decisions are made regarding the operation of the railroad under bankruptcy or after an adjudication of bankruptcy. The end result will no doubt be influenced by proposals to abandon or sell certain lines of railroad.

The Mountain Bell case has suffered a similar fate. The rate case has gone to a decision after proceedings in which a protective order was issued by the Commission secreting certain Mountain Bell data. Not feeling ourselves sufficiently

aggrieved as a result of this determination, we are not obliged to pursue the court case. Mountain Bell got the protective relief it sought and therefore should not be heard to complain on that issue. The Commission's order appeared to favor a company supplying competitive services to those of Mountain Bell. That company is therefore in a poor position to complain. The only other party surfacing in the ligitation did not participate at the agency level. It is hard put to demonstrate a grievance to the court. Although the case appears to be headed for a natural death, it did raise issues with profound implications. We are on record as standing for the proposition that when a utility asks for a rate increase, the data underlying its request should be public knowledge.

As a late development we can report that near the end of the year Mountain Bell has appealed certain aspects of a recent PSC order in a general rate increase case. Because of some post-decision remedies, the issues are not completely clear. It is apparent that the utility is proceeding under both the Administrative Procedure Act and the Public Utility Act and wants to keep open an opportunity to present evidence.

ADMINISTRATIVE HEARINGS

Prior to July 1, 1974, under statutory mandate, it was incumbent upon the Consumer Counsel to attend all hearings conducted by the Commission. The statutory mandate proved to be self-defeating because its effect was to burden the Consumer Counsel with attending many hearings involving motor carrier operating authorities where competition usually contested the applications and asked the relevant questions.

This mandate necessitated unnecessary expenditures of time and travel. The legislature in 1974 changed the provision, with the result that this office has not attended as many hearings as it did during the first year of its operations. However, the office has not been without projects and challenges.

Administrative hearings for the purpose of this report are assigned to three categories, congressional, rule-making and contested cases.

Congressional Cases

In the past year, this office, primarily through committee members, was involved in three matters that came to the direct attention of Congress.

With respect to the ongoing shortage of railroad equipment suitable for grain loading, this committee sponsored an open meeting in Great Falls, Montana to examine causes and possible solutions to the recurring problem of grain shippers in Montana caused by the shortage of proper railroad equipment. Officials from the shipping public and the I.C.C. and staff members of our congressional delegation participated. Correspondence was exchanged with the I.C.C. with respect to its separate investigations. Vice Chairman Senator Kolstad testified before Congress on the problem. Thus far Congress has adopted a number of resolutions and the I.C.C. has instituted and implemented a number of car service orders, monitoring procedures, and car distribution orders.

The committee also submitted written testimony regarding the implications of S-3419, a bill recently introduced in Congress by Sen. Jackson of the State of Washington. It speaks to regional energy problems of the Pacific Northwest and purports to achieve cost effective energy conservation,

to encourage development of renewable energy resources, to establish a representative power planning process, and to assure the region of an efficient and adequate power supply. As of this report, no final action has been taken on the bill. It and bills treating the same subject are expected to be introduced in the near future. This office was supportive of some features of the bill, but suggested amendments on other features. One difficulty is that some of the issues that the bill speaks to are between other states downstream on the Columbia River. Another problem is that the bill as introduced would not give Montana an equal voice in the planning process. Another apprehension of Montana interests which the committee does not usually involve itself in was the spectre of preemption of state's rights over utility plant siting.

Although adjustments with respect to schedules and service provided by Amtrak are not directly regulated by Congress, since there is no forum for public participation in a contested case type proceeding, experience teaches that the best leverage that Montana can bring to bear on Amtrack is through Congress. In this respect, the office has communicated with our congressional delegation and Amtrak management. In the past year three members of the committee submitted testimony in public hearings held in July in various places in Montana by the Department of Transportation regarding the merits of eliminating one of the Amtrak routes in Montana. Committee members were opposed.

Rule-Making

Federal Cases

Under the Federal Administrative Procedure Act, all railroad rate cases are treated as rule-making cases. On the other hand, utility and transportation rate cases under the Montana Administrative Procedure Act are defined as contested cases.

In the past year, this office has been involved at the I.C.C. agency level in one national railroad rate-making case and two Section 13 rate cases, not to mention the court cases heretofore reported. All cases involved failure of the Montana railroads to respond fully to discovery or to present a separation of intrastate operating experiences to the Montana Commission as required by our Supreme Court in the Montana Citizen's Freight Rate Assn. case.

One of the Montana railroads' efforts to avoid Montana scrutiny was in a case docketed by the I.C.C. as case No. 36634, which at this report is presently being processed to the exhausition of remedies in order to lay a foundation for later litigation if that is the pleasure of the committee. In this case, although the Consumer Counsel has twice lost on his contentions that the I.C.C. does not have jurisdiction until the case has been properly presented to the State agency, and that, as a matter of policy, the I.C.C. should not accept such case under such circumstances, the I.C.C. has let it be known that it will expect Montana railroads in future cases to make good faith presentation to the state agency or it will reject the Section 13 proceedings.

(The stage is set for yet another Section 13 case in which the situation will be ripe for the I.C.C. to follow through on its warning.) This was the first such Section 13 treatment in history to the knowledge of our advisers. It has twice since been applied to a limited extent by the I.C.C. in other cases.

Another precedent which occured for the first time in history was a recent order in the same docket that the I.C.C. would make a special investigation of Montana intrastate freight rates on grain shipments. (It did authorize rate increases to the interstate level on other commodities in Montana intrastate traffic.) We view this development with mixed emotions, taking pride in the fact that we were participants in such an historic and precedent-setting result. However, what is required by the I.C.C.'s ruling is the same type of material that would have had to have been presented in a complaint case. Ordinarily this would not cause distress. However, the time constraints and short notice may have caught Montana parties at an awkward moment wherein it will be difficult, if not impossible to prepare a professional presentation. If that occurs it could jeopardize the success of efforts to keep down rates on intrastate traffic. The committee will be examining the question how to proceed under the circumstances in its next few meetings.

With the authority of the committee, this office participated by way of filing a position statement in I.C.C. rulemaking docket Ex Parte 346 (Sub.No.1) entitled, "Rail General Exemption Authority". As the proceedings were initiated,

the I.C.C. announced that it would examine the merits of adopting a rule exempting from regulation the transportation of all agricultural commodities. This caused consternation among committee members in view of the cost implications to Montana grain shippers. The Consumer Counsel was authorized to participate. The I.C.C. recently issued a notice of proposed exemption limited to perishable fresh fruits and vegetables. In the supplementary information accompanying the notice of exemption, no mention was made of an intent to exempt shipments of grain.

Because the competitive viability of the Milwaukee Railroad is involved in two major merger proceedings pending before the I.C.C., this office has been authorized to make a filing in one of the merger cases and is monitoring the other in an attempt to find the procedural handle with which to participate in order to support whatever relief will keep the Milwaukee Railroad viable in its transcontinental service through Montana. In the so-called "Frisco Lines Merger" case involving BN and the St. Louis-San Francisco Ry., the I.C.C. has noticed that it will receive comments on the merits of granting Milwaukee trackage rights over BN lines between Miles City and Kuehn. A presentation in support of that relief was considered but rejected because only coal as a commodity would be involved. A separate application by Milwaukee for trackage rights between Terry, Montana and Spokane, Washington has recently been denied.

In the "Northern Lines Merger" case involving the old Northern Pacific and Great Northern Railroads and others,

the status of Protective Condition 33 which the I.C.C. originally imposed upon the merger is at this time unsettled because of a decision by the federal circuit court of appeals in Chicago. The I.C.C. recently decided to establish some procedural guidelines to consider including the Milwaukee and other affected railroads in the merger, or impose such other just and reasonable conditions upon the merger as may be necessary and appropriate, presumably to maintain the competitive viability of such railroads. A prehearing conference is scheduled for February.

From a literal reading of the Federal Administrative Procedure Act, it appears that track abandonments under the Interstate Commerce Act and the 4-R Act likewise are treated as rulemaking cases. Accordingly we report here that we are presently parties of record in four applications by the Trustee for the Milwaukee Railroad to abandon branch and spur trackage in Montana, one application by Union Pacific to abandon a spur line through Idaho to West Yellowstone, and one application by BN to abandon a line to Red Lodge, Montana. We have heretofore been involved in two other track abandonment cases to the extent of learning whether there was local resistance. Our experience thus far is that the I.C.C. works quietly in such cases. We make this observation because we have received limited correspondence in most cases after the I.C.C. has ordered investigations by its staff. If the Milwaukee and the U.P. follow through on negotiations for transfer of some Milwaukee lines west of Butte, there will no doubt follow an abandonment case of

historic proportions. It is hard to conceive of this office not being involved. The same would be true of possible transactions involving Milwaukee and BN.

State Rule-Making Cases

Last year the most important state rulemaking case in recent history of regulation occurred (in our opinion). That was the adoption by the Commission of rules of practice and procedure. This tended to bring some order out of what theretofore had been a level of chaos. This year has been one of developing experience in order to identify possible ambiguities and trouble areas. Progress has been orderly.

This year, the emphasis has been upon supporting minimum filing requirements in motor carrier cases, a ruling on which is anticipated from the Commission momentarily, and upon supporting adoption of rules by the Commission related to the handling of applications by utilities for temporary or interim authority to increase rates. This last particular exercise has been kicking around for well over a year. It has been the subject of voluminous correspondence, filing of petitions, filing of comments and briefs and presentation of oral testimony. It has not as yet resulted in a ruling by the Commission and does not give encouraging prospects for ruling for quite some time. This comment is submitted in light of the fact that the Commission has recently issued a notice for a new hearing on the subject matter in January, 1979. Recognizing the delay (which could be at the behest of certain regulated utilities with or without the tacit approval of the Commission), the Consumer Counsel has disinterred some proposed remedial legislation with respect to procedures

for handling requests for interim rate relief.

There were or are four rulemaking procedures conducted by the PSC which the Consumer Counsel monitored but did not take a position in. Those cases involved or involve criteria for handling requests for extended area service (non-optional, unlimited flat rate calling service between two or more exchanges) provided by Montana telephone companies; proceedings to consider rules for the adoption of so-called "stand by" rates for customers who have solar heated homes or homes heated with alternate exotic sources of energy; Pacific Power & Light's "Energy Saver Plan" and a similar plan for Montana Power Company wherein the utilities would loan homeowners money interest free to insulate, and otherwise upgrade their properties. The Consumer Counsel did not and will not take a position in any of these cases because of merits on both sides of the issues and because of a standing policy and practice to avoid locking itself into a particular posture for future rate cases or otherwise creating possible contradicting situations.

There are a number of other topics of rulemaking proceedings that have been initiated, or at least discussed, by the Commission, but upon which no recent action has been taken. Those include minimum filing requirements for water companies, railroad ratemaking evidentiary criteria, and interstate costing procedures for rails.

Federal Contested Cases

Although regularly monitoring the agencies, this office did not have occasion to participate in any new Civil Aeronautics Board proceedings or Federal Energy Regulatory Commission

(formerly F.P.C.) rate-making proceedings in the past year. It did, however, have occasion at the instruction of the committee, to intervene in a FERC hearing on the readjustment of charges to be paid by Montana Power Company for use of tribal lands underlying a portion of the Kerr Dam project on the Flathead River in northwest Montana. The Consumer Counsel submitted written testimony on his own behalf subject to cross-examination and written statements from a cross-section of the utility's customers. The case was disposed of by stipulation of the parties, particularly the Confederated Tribes, the utility, and the Department of Interior. We like to think that our participation expedited a compromise at a level much lower than the highest readjustment allowance testified to by witnesses for the tribes, but yet at a level realistically recognizing the effects of inflation.

There were some rulemaking proceedings conducted by the I.C.C., F.E.R.C., and F.C.C. which we would like to have gotten in to, but couldn't because of limitations on time and resources. At the recent national gathering of Consumer Counsels, our comments supportive of a national organization were based upon this frustration and the possibility that a national, central spokesman could fill this void in consumer representations as well as act as a clearinghouse of information.

State Contested Cases

In addition to court matters, which are commented upon in detail elsewhere herein, this office during the past year participated in or is participating in one proceeding before the Public Service Commission involving railroad rate increase

applications, three involving railroad station abandonment or realignment applications, two cases involving applications to abandon trackage, and five cases involving applications to abandon stockyards, and one involving an application by the Consumer Counsel that the Commission order Burlington Northern to acquire from the Milwaukee Railroad certain trackage which serves businesses at Bozeman for the purpose of preserving rail service thereto, since Milwaukee abandoned the service. We were involved in approximately eighteen motor carrier rate cases.

With respect to utilities, this office has been involved in approximately 41 contested utility rate increase cases, and one case relating to the establishment or termination of service to individual customers.

It is estimated that this office participated in cases in 1978 in which the PSC has delayed or denied proposed increased rates to transportation service by rail and motor carrier consumers of over $6,000,000.00. It is also estimated that this office participated in cases in which the PSC has delayed or denied proposed increases to utility customers of $46,000,000.00. Cumulative total differences to date measured by savings in the first year that new rates are in effect are estimated to be approximately $157,000,000.00. It remains to be seen what the end result of pending cases will be, but in most cases it appears that the only meaningful substantive opposition to the proposed increases will be presented by the office of Consumer Counsel.

One of the issues pending which has high potential for going to court is the merits of adjusting a utility's operating expenses to reprice purchases of coal from wholly-owned mining subsidiaries to a level which, in our opinion, would prevent exploitation of consumers. The PSC recently ruled on this issue in a major utility case. Another case is anticipated. In fact, all three of Montana's electric utility companies have wholly-owned coal mining subsidiaries. This subject is a matter of close scrutiny by the S.E.C. and F.E.R.C.

An order has been made in a recent major Mountain Bell rate increase case which also has recently gone to court, although the utility has available to it the remedy of another petition for rate increase based upon a more recent test year. One of the utility's problems is instability and uncertainty because of rivalry for markets for terminal equipment in Montana because of recent F.C.C. decisions upheld by federal courts. At any rate, the Public Service Commission, based upon the testimony of witnesses sponsored by the Consumer Counsel, has gravitated towards cost justified rates with emphasis on uniform assignment of major cost categories among customer classes, and away from value of service rates and long run incremental cost justified rates (wherein the utility selectively assigns cost categories among its customer classes).

ANTICIPATED CASES AND PROJECTS

Under this title in our 1977 annual report, we correctly anticipated an increasing case load of railroad track abandonments

under the 4-R Act. Demands on our time to date have been less than apprehended on a per case basis. However, with the advent of the wholesale abandonment of line by the Milwaukee Railroad and the negotiation for sale of a substantial portion of its lines to the Union Pacific and possibly BN, the prospects for an increased case load becomes more real.

We have heretofore speculated upon the impact of environmental measures upon the facilities, and therefore the rates of municipal water and sewer departments.

We have also reported repeatedly that the Public Utility Regulatory Policies Act mandates that electric utility rate structure be examined within the next two calendar years. Fortunately, Montana appears to be abreast of, if not ahead of, the game in that its three electric utilities now have ongoing load studies which should provide meaningful, firm data for the purposes of this exercise.

No doubt inflation and the Natural Gas Policy Act will trigger regular filings by Montana's two major gas utilities for rate increases reflecting those cost impacts. We don't anticipate serious demands upon the time of the staff to examine rate increase applications by smaller utilities relying upon the major utilities for their sources of gas supply.

As reported earlier, we anticipate that the coal prices charged by electric utilities wholly-owned mining companies will be examined closely.

It is also anticipated that Mountain Bell will be filing a major rate case within the near future. It is also

viewed as a possibility that long run incremental cost pricing theories will be advanced by some utilities. If that happens, serious issues of law will be raised.

As of this report, Montana-Dakota Utilities has filed for a rate increase to pass through the impact of the December 1, 1978 gas price increases mandated by the Natural Gas Policy Act. We have submitted a written narrative comment on the application showing the results of our examination of the company's applicable records. The Commission made an order adopting our recommendations. Proceedings for progressing the case to a final order remain to be set.

Mountain Bell earlier withdrew an application for authority to increase rates to finance what it called its "Rural Improvement Plan" to modernize its services to rural customers. Our participation was to support early implementation of the plan, but also to challenge some of the rates requested. Shortly before the day and time appointed for hearing, the company withdrew. We like to think that after re-examining their rate computations, they will renew their filing. This case also involves revenue in excess of $1 million annually.

At this point, everyone is cognizant of the implications of the bankruptcy proceedings involving the Milwaukee Railroad. However, in Montana, no one seems to be taking the initiative for an organized policy or effort to minimize the impact

upon Montana consumers and shippers. For our part, as reported above, we have tried to participate where we could. The trustee in bankruptcy has scheduled his report to the referee by mid-year 1979. Although transfers or abandonments of operating rights recommended by the trustee are subject to approval of the I.C.C., it could be that failure to participate in the bankruptcy proceedings could undermine later efforts under I.C.C. scrutiny. No doubt the legislature will be examining these matters. No doubt it will be called upon to adopt a rail plan under the 4-R Act. It is our understanding that a number of proposals for acquiring or rehabilitating right-of-way and road bed could be advanced. As reported earlier, this committee rejected a proposal that I.C.C. and federal court litigation be conducted by this office with appropriations to the Consumer Counsel's earmarked revenue fund. It was the committee's judgment that such an effort should be funded from a broader base such as the general fund. Whether the legislature as a whole sees merit in this office pursuing such a course with acceptable financing remains to be seen.

As we reported in 1977 and throughout the year, it remains to have motor carrier annual reports programmed to a state computer. At the outset, the Commission and this office agreed to share the costs of such an effort. As the year progressed, the Commission realized it was running short on funds, so the committee agreed to pay the entire cost. This determination was communicated to appropriate representatives of the Department of Administration over six

months ago, but no action was taken. Recently the committee authorized an updated analysis and estimate by the Department of Administration. It is desirable that the material be computerized. This is the accepted regulatory practice which provides means of verifying rate increase data and instantanious retrieval of valuable data. The information stored would also be useful to the Department of Revenue in computing the Consumer Counsel tax and collecting funds. We have had the feeling that a number of motor carriers are not paying the Consumer Counsel tax because their identies or correct gross operating revenues have not been disclosed to the Department of Revenue by the Commission. Apparently the Department of Revenue feels the same way, because we understand that they plan to introduce a bill calling for more detailed information from the Commission in order to develop the Consumer Counsel tax levy rate.

A problem that is likely to arise with respect to input on electric utility rate structure is who is going to provide that input. Under the Public Utilities Regulatory Policies Act, there will be $40 million in grant money available for each of the calendar years 1979 and 1980 to state regulatory agencies such as the Public Service Commission. There will also be $10 million in grant money available for each of those years to Consumer Counsels. There is also a provision to create an "intervention" team at F.E.R.C. to participate in state regulatory proceedings. Finally, there is also a provision that private groups who participate and are successful in achieving rate reform can claim attorney fees from the

utility being scrutinized. Bearing on the matter is the fact that our statute, R.C.M. 1947, 70-707(1) (now codified as 69-2-102 MCA),establishes the Consumer Counsel as the input agency in cases which are actively contested by the Consumer Counsel. One question suggested by the statutory language is, what happens in a case in which only rate structure is involved and revenue increases are not requested? (There may not be such a case.) It seems a safe assumption that, regardless of the participation of others, the Consumer Counsel will likely be involved. If there is multiple participation, no doubt there will be some public inquiry why the duplication of services. Functions should either be sorted out or harmonized.

ASSOCIATION ACTIVITIES

The foregoing title is carried over from previous annual reports. At an earlier time, this office participated on a coal gasification task force and regional conferences of state governments. However in recent years, partly because of changing times and partly because of heavy case load, the office has not been involved in such activities. There may have been a resurgence of such activities or activities of a related nature which can be reported under this title.

Recently an informal gathering of Consumer Counsels and other government officials exercising similar functions took place in conjunction with the annual convention of NARUC. At that time, although other subjects of mutual concern were discussed, it was resolved to go forward in an attempt to

organize a national association of consumer counsels which would serve as a repository and clearing house of information and a vehicle through which to address questions of national concern, such as congressional deliberations and rulemaking proceedings conducted by federal regulatory agencies. THe question of financing such an organization through dues or grants or other means has not been resolved, and there is no current obligation upon this or any other consumer counsel to expend funds for that purpose. A steering committee of volunteers will meet in May in Columbus, Ohio in conjunction with a workshop of regulatory attorneys in an attempt to hammer out a proposal for a national organization. The proposal will be submitted for adoption to another gathering of consumer counsels at the 1979 NARUC convention in the fall in Atlanta, Georgia. This office expressed support for the notion, particularly the vehicle for providing input in the national decisionmaking process.

During the better part of the year 1978 committee chairman, Rep. Quilici, has served as a member of the Ad Hoc Pacific Northwest Power Committee of the Western Conference of the Council of State Governments. In that capacity he has been kept infomed of regional and national proposals and developments with respect to energy regulation and has provided input on behalf of Montana concerns.

Although this office is not a member or contributor, it recently submitted a statement in support of an application by the Northern Rockies Action Group to HEW for a consumer education grant under the Consumer Education Act. The grant

application, as understood by the office, was to fund an effort to develop effective consumer participation in regulatory decision-making in Montana, among other things. It was understood that NRAG would attempt to identify, organize and educate individual and group consumer spokesmen and establish an office for advising them of the pendency of matters of regulatory concern and how to proceed to make a presentation on behalf of consumer interests. The support of this office was in recognition of past inability to provide such service because of heavy case load and lack of continuity among consumer spokesmen. In recent years, consumer spokesmen and groups have surfaced on an ad hoc basis only. It is the feeling of the Consumer Counsel that input from consumers, although maybe not technical in nature, is an important adjunct to the professional representation on behalf of consumers provided by the office.

One such potential consumer group that appears to have been organized recently and intends to participate in the pending Montana Power gas rate case and likely will participate thereafter is entitled "Montana Power To The People". Its headquarters are in Great Falls. We have been contacted by its organizers and attorneys and have offered suggestions how to intervene and participate. This organization is a project of Opportunities, Inc., a community action agency in Great Falls.

REMEDIAL LEGISLATION

Under the provisions of R.C.M. 1947, 70-707(7), now codified as 69-1-222 MCA, the Consumer Counsel may recommend

remedial legislation to the Legislative Consumer Committee. The obvious result of such procedure has been that, if recommendations are viewed favorably, bills are drafted, introduced and carried by committee members. There has been little past experience to develop a custom, practice or policy how the committee should proceed with the matter of remedial legislation. It therefore is open to the committee to review the recommendations of the Consumer Counsel, revise them and decide whether any of the proposed bills merit being enacted into law. If the decision is favorable, an acceptable bill is drafted by the Consumer Counsel and submitted to the Legislative Council. Thereafter it is introduced and carried by one or more committee members. There is no prohibition in the Consumer Counsel Act or elsewhere against an individual committee member or any other legislator suggesting bills himself or proceeding on his own to support or oppose recommended bills or bills of a similar nature treating the same subject.

For the 1979 session, the Consumer Counsel first submitted nineteen proposals in narrative form with written justification therefore and followed up with four more proposals in a similar manner. All proposals dealt with substantive regulatory matters. The majority of the proposals were aimed at the temporary rate increase and nine month limitation upon Commission action features of Montana regulatory statutes, these being the subjects of the greatest number of what the Consumer Counsel thought were abuses during the past biennium. Other proposals were inspired by experiences under Montana statutes during the biennium and by observation of what has taken place in other jurisdictions.

As of this report, the committee has adopted two proposals and requested the Consumer Counsel to reduce them to bill form. It has tabled a third proposal. The committee hopes to discuss matters of mutual concern with members of the Public Service Commission in early 1979.

The two accepted proposals as of this report are: (1) a bill to require that utilities planning to file for authority to increase rates to increase revenue in amounts of over $1 million give at least three months advance notice of such intent to the Commission and Consumer Counsel estimating the amount of revenue involved and the proposed rate structure to derive that revenue; and (2) a bill making it clear that the burden of proof in utility rate-making cases before the Public Service Commission is at all times upon the utility. A bill providing that when a utility makes an application for temporary or interim authority to increase rates, no decision will be made thereon until the Consumer Counsel and the consuming public are given the constitutional right of participation has been tabled pending discussion with the PSC.

It is the opinion of the Consumer Counsel that this package of bills will prohibit secret rate increase grants which have occurred in the past, assure that the utility establishes the affirmative of its application on all issues, prohibit surprise shifting of the burden to protestants, and make it easier for both the Consumer Counsel and the Commission to control their budgets by being better able to anticipate case loads which require heavy expenditures of time and money. This should not unduly burden utilities, as managements

of most utilities are preparing their rate cases far in advance of filing -- sometimes a matter of years. If their applications for temporary rate increase are meritorious, they should have nothing to hide and no qualms about scrutiny by the public.

OTHER LEGISLATION

Other legislation not dealing with substantive regulatory matters will focus primarily upon appropriations. As reported elsewhere, there no doubt will be appropriation bills funding the office for anticipated functions and case loads. The committee is reviewing possible bills to take the initiative and revise the Consumer Counsel Act with respect to variable funding. The committee has declined to sponsor a bill funding efforts to protect the competitive viability of the Milwaukee Railroad through the earmarked Consumer Counsel fund. The Department of Revenue advises that it intends to introduce two bills to clarify its powers to enforce payment of the Consumer Counsel tax and to elicit more detailed and reliable information about gross revenues of regulated companies from the Public Service Commission.

We have also been advised by the Department of Natural Resources and Conservation that it intends to have a bill introduced establishing the Consumer Counsel as an official input agency on behalf of public concerns under the Major Utility Siting Act. Comments have been sought from committee members and other interested parties with respect to this feature and other proposed amendments to the Major Facility Siting Act.

CONCLUSION

In making this and past reports, particularly as regards remedial legislation, this office has been obliged to indulge in an exercise often abrasive to other parties, such as the Public Service Commission, Commissioners and staff. It is an unavoidable and necessary function of this office under Montana statutes.

In doing our duty, we feel obliged also to provide balance by reporting progress when it has occurred. In our last annual report, we did state in our conclusion that the Commission had made progress in conducting orderly rate cases and in regulating under its delegated authority. We can report at this time that progress continues, and that our relations and orderly dealings with the staff are better than they have been at any time since the implementation of the Consumer Counsel Act. Nothing is perfect and much remains to be done. Moreover, we should always bear in mind that not only this office, but the Commission, is subject to change and turnover, both from attrition due to the elective process and change in structure due to the legislative process. Recognizing this fact of life, the Consumer Counsel has advocated the remedial legislation that is now before the committee because future Commissions may not have a sense of continuity and may be more sympathetic with the regulated companies. We would hate for this office, on behalf of the consuming public, to have to refight many of the same battles.

By way of summing up:

The Public Utility Act has been interpreted to apply to

sewer service. Experience has demonstrated that the subject can be regulated.

The I.C.C. has made two historic decisions in Section 13 cases which, for the first time, give consumer and shipper interests a hope for consideration in the intrastate rate-fixing process.

The rules of practice mandated by the legislature have been effect for over a year now, and have contributed to the orderly case load management and the reduction of so-called regulatory lag.

Minimum filing standards for motor carrier rate increase cases should be adopted shortly. These should lead to the reduction of regulatory lag. The long awaited computer programming of annual reports of motor carriers will provide an invaluable tool in the regulatory process.

The trend towards cost justification of telephone and transportation rates has been enhanced in federal and state rate cases.

Consumer oriented rate-making standards have been perpetuated in recent decisions of the Commission based upon testimony of witnesses sponsored by the office.

Projects for the future include exploration of utility rate structures under federal statutes, establishing standards for water rate cases and presumably sewer rate cases, a concerted effort to protect the competitive viability of the Milwaukee Railroad in an effort to keep railroad rates competitive and minimized for Montana shippers, examination of the prices paid by electric utilities to their mining

subsidiaries for coal, and a heavy load of utility cases continuing through the middle of the next decade.

If these anticipated events occur, this office will not be found wanting for challenges and projects far beyond the next biennium.

Dated December 29, 1978.

Geoffrey L. Brazier
Montana Consumer Counsel
34 W. Sixth Avenue
Helena, Montana 59601